Filed 12/14/16 In re E.S. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

In re E.S. et al., Persons Coming Under the Juvenile Court Law.	C081019
SAN JOAQUIN COUNTY HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. SAMANTHA S. et al., Defendants and Appellants.	(Super. Ct. No. J06432 & STKJVDP20130000176)

Samantha S. (mother) and Michael L. (father) appeal from the juvenile court's order denying their petitions under Welfare and Institutions Code section 388[1] without a hearing. They contend the court erred by finding that the petitions did not state a prima

[1] Undesignated statutory references are to the Welfare and Institutions Code.

facie case requiring a hearing; they also contend that a San Joaquin County Superior Court local rule under which the court found the petitions untimely is invalid. Concluding that the petitions did not state a prima facie case that there were changed circumstances and/or new evidence, or that the parents' requested orders would be in the minors' best interest, we shall affirm. In light of that conclusion, we do not address the parents' arguments about the local rule.

FACTUAL AND PROCEDURAL BACKGROUND

On July 3, 2013, San Joaquin County Human Services Agency (agency) filed section 300 petitions as to minors E.S. (born in Jul. 2004) and C.L. (born in May 2013). The petitions alleged that mother is the parent of both minors, father is the father of C.L., and Eric T., an incarcerated felon, is the father of E.S.[2] According to the petitions, the minors were endangered by domestic violence between mother and father and by mother's unaddressed mental health problems and lack of stable housing; mother had been arrested for cutting father and his adult daughters with a box cutter. E.S. was living mostly with the paternal grandmother; he did not like staying with the parents because of the domestic violence. Mother currently resided with father, even though he had allegedly requested a restraining order against her.

The juvenile court ordered the minors detained on July 3, 2013, and took jurisdiction on September 23, 2013.

At the disposition hearing, which concluded on March 3, 2014, the juvenile court adopted the agency's recommendation for out-of-home placement for the minors and reunification services for mother and father (but not for Eric T.). The disposition report

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[2] The juvenile court subsequently found that father was the presumed father of C.L., and Eric T. (not a party to this appeal) was the biological father of E.S. Throughout these proceedings, father has sought the return only of C.L. to his custody; mother seeks the return of both minors.

noted that the minors were doing well in foster care, although E.S. would like to go home to mother. The parents did not take responsibility for their domestic violence problem, which appeared to be a matter of mutual combat. Father had unresolved anger problems, but seemed willing to participate in services. Mother had been diagnosed with depression and borderline narcissistic traits, had an anger problem, lacked insight into her motives, and appeared to suffer from deteriorating mental health. Both parents continued to engage in chaotic and dangerous behaviors. Mother visited the minors regularly, and father did the same with C.L. (on separate occasions); they behaved appropriately with the minors for the most part, but their conduct toward visitation supervisors was sometimes troublesome, and mother's dissatisfaction with the minors' placements had led to frequent placement changes.

In keeping with the agency's recommendation, the parents received 12 months of reunification services.

The six-month review report stated that the parents were participating in services and making progress. Father continued to live in his own home with one of his adult daughters; mother moved between relatives' homes while seeking a place of her own. Supervised visitation, which had been suspended due to both parents' violation of a restraining order, had been reinstated. However, the agency still had concerns about mother's mental health problems and the parents' ability to abide by the restraining order and to demonstrate consistency in visitation. E.S.'s behavior had caused concern in the minors' foster placement, and C.L. was getting therapy for a language delay.

At the six-month review hearing on May 22, 2014, the juvenile court found the parents' progress adequate and granted the agency discretion to offer unsupervised visitation.

The 12-month review report recommended further services for the parents, and more visitation once both parents' homes had been approved. Mother had recently found an apartment suitable for herself and the minors. Both parents continued to participate in

counseling, but with limited benefit to date; mother had only recently found a counselor she thought she could work with, and father still showed the same troubling conduct he had shown before. Mother doubted whether father could care for C.L. The minors, now in their seventh placement, were doing well there and had bonded to their current foster family; in October 2014 both were assessed as adoptable.

It was still unclear whether either parent could satisfactorily care for the minors: although they had completed their case plans, behaved acceptably during visitation, and had suitable housing, they continued to display anger and mood disorder problems, and the dynamics of their relationship presented an ongoing difficulty. Furthermore, they blamed the agency's involvement for their current troubles. On the other hand, they now realized their relationship was dysfunctional and to continue it would not be in the minors' best interest.

On December 30, 2014, the juvenile court suspended visitation and ordered the parents to drug test because of reports that father was using marijuana and possibly other drugs in C.L.'s presence and that mother was "out of control." Father tested positive for THC; mother tested positive for THC and cocaine. Father claimed he had a medical marijuana card, though he had never mentioned it before. Mother's therapist suspected in September 2014 that mother was using controlled substances, but mother claimed someone must have slipped something into her drink before she was tested.

In the social worker's view, the parents were "back to square one when it comes to alleviating the concerns that initially brought them to the attention of Child Protective Services." Despite all the services they had received, they had not improved in their ability to coparent and abide by personal boundaries so as to keep the minors safe. The agency now recommended termination of reunification services for both parents.

The minors were closely bonded to their foster family and to each other. The foster parents were open to legal guardianship or to "the possibility [of adoption] in the

future." The agency recommended keeping the minors together and moving toward legal guardianship.

On February 6, 2015, the juvenile court terminated the parents' services and set a contested section 366.26 hearing for June 3, 2015. The parents gave notice of intent to file writ petitions in this court challenging the order, but did not subsequently do so; this court closed the case on March 18, 2015.

In a status review report filed June 2, 2015, the agency recommended adoption by a family other than the current foster family, because the foster parents were unsure if they could adopt. No potential "permanent/forever family" had come forward so far. The agency's exploration of relative placement had not yet borne fruit. The parents continued to have weekly supervised visits, which went well.

On June 3, 2015, the juvenile court reset the section 366.26 hearing to September 30, 2015.

On August 12, 2015, the juvenile court ordered a permanent plan of adoption.

On September 4, 2015, father filed a section 388 petition seeking custody of C.L. and the reopening of reunification services.

To show changed circumstances, father alleged that he had been attending, and helping to manage, Alcoholics Anonymous/Narcotics Anonymous (AA/NA) meetings run by Surrender to Live since February 14, 2015; had engaged in further counseling through the Women's Center; had had no further negative interactions with mother or police reports filed since January 2015; and had had good visits with C.L. since February 2015.[3] Father claimed that due to the meetings and counseling, he had grown as a

[3] Father attached attendance logs of the AA/NA meetings, a letter from Frank Garcia of Surrender to Live attesting to father's strong participation in the group, and a letter from Hack Xiong of the Women's Center confirming that father had received counseling about domestic violence issues on five dates in July and August 2015.

person, learned to verbalize his feelings and to empathize with others, and discovered how to work around his "trigger points" to avoid resorting to confrontation or drugs.

To show that his proposed order would be in the minor's best interest, father alleged that he had "a strong and bonded relationship" with C.L., who knew him "as father and ha[d] a strong attachment to him," and that father could "provide his son nurture, stability, love and safety."

On September 29, 2015, mother filed a section 388 petition seeking custody of both minors and the reopening of reunification services.

To show changed circumstances, mother alleged that she had attended AA/NA meetings at least three times per week since February 2015 (with a brief interruption in June 2015); she had been randomly drug tested and all tests had been negative; now that Medi-Cal had approved funding, she had resumed counseling with her former counselor regarding domestic violence, anger management, and her prior personality disorder diagnoses; she had avoided negative encounters with father in the past four or five months and had learned how to talk about things with him without arguing and fighting; and she continued to have positive visits with the minors. Mother did not document her attendance at meetings, her drug testing, or her counseling.

To show that her proposed order was in the minors' best interests, mother alleged that she had "a strong bonded relationship with [her] children"; "they [knew her] at [*sic*] their mother and ha[d] a strong attachment to [her]"; "[t]hey s[aw] [her] as the parental figure in their minds"; and she could "provide them with a loving home and safety and stability."

The agency opposed both parents' petitions on two grounds: (1) the petitions were untimely under the Superior Court of San Joaquin County, Local Rules, rule 5-300B (hereafter Local Rule 5-300B), which requires section 388 petitions seeking the return of minors to their parents to be filed not less than 20 "judicial days" before any previously

set section 366.26 hearing; and (2) the petitions failed to state a prima facie case as to either changed circumstances or the minors' best interest.

The section 366.26 report, filed September 9, 2015, requested a 90-day continuance to assess placement options. No prospective adoptive families had been identified, and the current foster parents were not in a position to adopt, though they remained committed to legal guardianship. Relative placements were still being explored, but without results up to now. The current plan remained adoption of the minors as a sibling set. The parents' visits generally went well, although mother sometimes failed to follow the visitation staff's rules; however, E.S. wanted to get more involved in outside activities and feared the visitation schedule might interfere with them, and the social worker recommended reducing mother's visits accordingly.

On September 30, 2015, the juvenile court reset the section 366.26 hearing to January 27, 2016.

On October 19, 2015, the juvenile court denied the parents' section 388 petitions without a hearing, ruling: (1) they were untimely under Local Rule 5-300B; (2) there was no "prima facie evidence to support the conclusionary statements of changed circumstances"; and (3) there was no showing that granting the requests would be in the minors' best interest.

DISCUSSION

The parents contend their petitions made out a prima facie case as to both required elements under section 388 (changed circumstances and the children's best interest), and therefore the juvenile court erred by refusing to hold a hearing on the petitions. We disagree.

A petition to change or modify a juvenile court order under section 388 must factually allege that there are changed circumstances or new evidence to justify the requested order, and that the requested order would serve the minors' best interests. (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.) The petitioner has the burden of proof on

both points by a preponderance of the evidence. (Cal. Rules of Court, rule 5.570(h)(1)(D).)[4] "A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests. [Citation.]" (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47 (*Casey D.*).) In assessing the petition, the court may consider the entire history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189 (*Justice P.*).)

To decide whether a parent has met his or her burden under section 388, the juvenile court must consider such factors as the seriousness of the problem that led to the dependency, and the reasons for the problem's continuation; the degree to which the problem may be and has been removed or ameliorated; and the strength of the relative bonds between the dependent child and the child's parents or caretakers. However, this list is not exhaustive. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1229; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.)

When a parent brings a section 388 petition after a section 366.26 hearing has been set, the best interests of the child are of paramount importance. (See *In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) Therefore, the juvenile court looks not to the parent's interest in reunification but to the child's need for permanence and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

The petition must be liberally construed in favor of its sufficiency. (Rule 5.570(a).) However, if the juvenile court finds that even so construed the petition fails to make a prima facie case as to either or both tests under section 388, the court may deny the petition without an evidentiary hearing. (§ 388, subd. (d); rule 5.570(d), (h)(2); *Justice P., supra,* 123 Cal.App.4th at p. 189.)

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[4] Undesignated rule references are to the California Rules of Court.

We review a ruling denying a section 388 petition for abuse of discretion. (*In re S.R.* (2009) 173 Cal.App.4th 864, 866.) We reverse only if the ruling exceeded the scope of the juvenile court's discretion, or if under all of the evidence, viewed most favorably to the ruling, no reasonable judge could have made that ruling. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 (*Jasmine D.*); see *Great West Contractors, Inc. v. Irvine Unified School Dist.* (2010) 187 Cal.App.4th 1425, 1459.)

Changed Circumstances or New Evidence

The petitions alleged essentially the same points under this heading: the parents' attendance at 12-step meetings, their engagement in counseling, their improved relations with each other, and their positive experiences in visitation. At best these points show changing, not changed, circumstances, which, as we have explained, is not enough.

The parents' attendance at 12-step meetings (assuming that mother's undocumented claim suffices for prima facie purposes) shows changing circumstances at best and is far from sufficient to show that the parents are living a sober lifestyle such that they will not relapse, as they did after the case had been going on for over a year. Further, although the parents suffered a major setback in their attempts to regain custody of their children due to substance abuse, substance abuse was not among the original reasons for the minors' removal from the parents' custody. It was never even raised as an issue until the case had been going on for a year. Thus, limited attendance at meetings does nothing to show that the parents are on their way to solving the problems that led to the minors' removal: domestic violence and mother's mental health concerns. (See *In re B.D., supra*, 159 Cal.App.4th at p. 1229; *In re Kimberly F., supra*, 56 Cal.App.4th at p. 532.)

The parents' engagement in counseling and visitation is insufficient to allege changed circumstances. The parents have already gone through a great deal of counseling and have consistently visited the minors. Thus these allegations show only that the parents are maintaining the status quo, or attempting to get back to the conditions

that existed while they still received services. Throughout that period, the agency noted that counseling had not changed the parents' conduct or attitudes. The mere fact that they have resumed counseling, therefore, does not establish a prima facie case of changed circumstances.

Father's claims of specific improvements from his latest round of counseling go a bit farther in that direction. However, in light of the whole history of the case the juvenile court could properly set these claims against father's consistent pattern of denying domestic violence and other wrongdoing, as well as his more recent drug use, and to doubt accordingly whether father had actually established, even for prima facie purposes, that circumstances had truly changed. (*Justice P., supra*, 123 Cal.App.4th at p. 189; *Casey D., supra*, 70 Cal.App.4th at p. 47.)

The parents' claims of improved relations with each other also allege changing circumstances at best. (*Casey D., supra*, 70 Cal.App.4th at p. 47.) It is encouraging that the parents have had no further police reports filed against them and that they can talk to each other without arguing and fighting, but there had been similar periods of apparent domestic peace in the past, which always ended with new acts of domestic violence. Nor do the parents' claims show, even for prima facie purposes, that the parents have begun to be able to coparent the minors, which the agency has always considered the sine qua non for reunification in this case.

Father attacks the juvenile court's finding that they failed to show "prima facie evidence to support the conclusionary statements of changed circumstances." We agree that this finding blurs the distinction between the evidence needed to establish changed circumstances at a hearing and the allegations needed to make a prima facie case, and that it disregards father's documentation of attendance at 12-step meetings and counseling. However, if a court's ruling is a reasonable exercise of the court's discretion, we do not reverse merely because some of the supporting reasoning might be questioned. (*Jasmine D., supra*, 78 Cal.App.4th at p. 1351; *California Aviation, Inc. v. Leeds* (1991)

233 Cal.App.3d 724, 731.) For the reasons already stated, we conclude the ruling was correct on the merits.

The Children's Best Interest

But even if the parents made a prima facie case of changed circumstances, their showings fail on the second test under section 388: the children's best interest.

Where the juvenile court has terminated reunification services, determined that minors are adoptable, and ordered a permanent plan of adoption, the minors' need for permanence and stability outweighs the parents' claims that their biological ties to the minors should control the outcome. (*In re Stephanie M., supra*, 7 Cal.4th at p. 317; *In re Marilyn H., supra*, 5 Cal. 4th at p. 309.) Here, that is essentially all the parents have alleged as to why it would be in the minors' best interest to halt the process of finding an adoptive home and turn back the clock for an indefinite period while the court waits to find out if the parents can ever become capable of acting as true parents. (Cf. *Casey D., supra*, 70 Cal.App.4th at p. 47.)

Moreover, father's claim fails for another reason: he seeks only the return of his biological child C.L., but the minors have been together from the start of the case, are closely bonded, and have been found adoptable as a sibling set. Father gives no reason why it would be in the best interest of either minor to sever that bond.

Mother relies on *In re Aljamie D.* (2000) 84 Cal.App.4th 424 (*Aljamie D.*), where the reviewing court found the juvenile court had erred by denying the mother's section 388 petition without a hearing. *Aljamie D.* is distinguishable. First, unlike in this case, no permanent plan of adoption had been ordered: the minors in the case were under a long-term order of foster care, with the possibility of legal guardianship. (*Id.* at pp. 427-430.) Second, the minors had previously testified that they wanted to live with the mother (*id.* at p. 430); in our case, E.S. (the only minor old enough to express an opinion on this point) has bonded with his current foster family. Third, the mother did not request return of the minors to her or the reopening of reunification services, as here, but only a

60-day trial visit. (*Id*. at p. 428.) Because of these factual and procedural differences from the present case, *Aljamie D.* does not assist mother.

For all of the above reasons, the parents have failed to show that the juvenile court's order denying their section 388 petitions without a hearing was an abuse of discretion.

DISPOSITION

The orders denying the parents' section 388 petitions are affirmed.

/s/
Blease, Acting P. J.

We concur:

/s/
Murray, J.

/s/
Duarte, J.